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No. 88-1233

In The

Supreme Court of the United States

October Term, 1988

HAROLD W. GRANDCHAMP and PETER J. SEEWALD,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION

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QUESTION PRESENTED

I. Should this Court take jurisdiction and grant certiorari when the lower court's decision was that the state law standard for outrageous conduct were not satisfied because the plaintiffs failed to present any evidence of conduct which was truly outrageous?

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RELEVANT STATUTORY PROVISIONS

Petitioners incorrectly claim that this case involves the Age Discrimination and Employment Act (ADEA), 29 U.S.C. §§621-34 (1988). However, the Tenth Circuit

*In order to comply with Supreme Court Rule 28.1 Respondent states that *UAL* corporation is the parent company of United Air Lines, Inc. All subsidiaries of United Air Lines, Inc. are wholly owned and United Air Lines, Inc. has no affiliated companies other than the subsidiaries.

Court of Appeals specifically noted it was *not* addressing the ADEA claim in its opinion because the jury found that United had not violated the ADEA and Grandchamp and Seewald did not appeal from that verdict. *Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 383 note 4 (10th Cir. 1988), *see* Petition, page A-10, Note 4.

STATEMENT OF THE CASE

Petitioners' Statement of the Case (Petition at pages 3 through 6) is substantially correct concerning the factual underpinnings of this case. However it contains inaccurate characterizations of the Tenth Circuit Court of Appeals' holding. Those inaccuracies are addressed in the argument which follows.

SUMMARY OF THE ARGUMENT

This Court should not assume jurisdiction to render opinions on cases that were decided solely on the basis of state law. The Tenth Circuit Court of Appeals based its decision on the fact that Petitioners presented no evidence to support an outrageous conduct claim as that claim has been defined by the Colorado state courts. Contrary to Petitioners' assertions, the opinion did not state that Grandchamp's and Seewald's only remedy was under the ADEA. Nor did it state that all plaintiffs must prevail under the ADEA in order to prevail on an accompanying claim for intentional infliction of emotional distress. Moreover, a holding that Plaintiffs need not first prevail on the ADEA claim before proceeding on an

outrageous conduct claim would be superfluous and would not change the result in this case.

ARGUMENT

I. This Court does not have a jurisdictional basis to hear this case because it is based solely upon the application of state law concerning the tort of outrageous conduct.

The Court's jurisdiction, power and duty in granting a Writ of Certiorari should be exercised only to correct inaccurate adjudications of federal rights. Sup.Ct.R.17. This case as postured on appeal does not involve an adjudication of federal rights.

Grandchamp's and Seewald's case against United Air Lines originally contained several claims for relief, but went to the jury solely on the Federal ADEA claim and a state law claim of outrageous conduct. The jury found against the Plaintiffs on the Federal ADEA claim and this finding was not challenged on appeal.

The sole subject of the appeal was Plaintiffs' outrageous conduct claim. The reversal on appeal reiterated the basic prerequisites necessary to sustain an outrageous conduct claim. It did not involve questions of federal rights, preemption or the philosophical interrelationship between federal age discrimination and state law claims. The question decided was simply whether the factual evidence submitted on the outrageous conduct claim was sufficient to justify submission of the question to a jury. Applying state law standards, the Tenth Circuit stated:

> United further argues that, if the district court did make the requisite threshold determination of outrageous conduct, that determination was in error. We agree. At the close of Plaintiffs' case, there was no evidence upon which the jury could find United guilty of outrageous conduct toward Grandchamp and Seewald. The trial court should have directed a verdict for United on that claim.

Grandchamp v. United Air Lines, Inc., Id. at 384, *see* Petition, A-11.

Petitioners incorrectly characterize this as a case involving the interrelationships of the ADEA and state law claims. The Court of Appeals did not opine that state law claims could not exist independently of ADEA claims. The Court's opinion simply noted that Colorado state law required some showing that the conduct complained of was truly "outrageous". It cited both Colorado state and federal district court cases where bare allegations of wrongdoing were held insufficient to establish a claim of outrageous conduct.

> *See Therrien v. United Air Lines, Inc.*, 670 F. Supp. 1517, 1524 (D. Colo. 1987) ("[A]n allegation by an employee that he was dismissed or demoted wrongfully, summarily, or in violation of the procedures set forth in an employee manual fails to state a claim for intentional infliction of emotional distress."); *Steinberg v. Thomas*, 659 F. Supp. 789, 795 (D. Colo. 1987) (discharge and alleged defamatory remarks do not support a claim of outrageous conduct); *Brezinski v. F.W. Woolworth Co.*, 626 F. Supp. 240, 244 (D. Colo. 1986) (alleged age discrimination does not support a claim of outrageous conduct); *Covert v. Allen Group, Inc.*, 597 F. Supp. 1268, 1269-70 (D. Colo. 1984) (no outrageous conduct in refusal to honor a promise to employ); *Salimi v. Farmers Ins. Group*, 684 P.2d 264, 265 (Colo. Ct. App. 1984) (demotion in violation of

employer's policy and procedure manual is not outrageous conduct); *Widdifield v. Robertshaw Controls Co.*, 671 P.2d 989, 990-92 (Colo. Ct. App. 1983) (reversed jury verdict for outrageous conduct where plaintiff's job was eliminated after 10 days).

Grandchamp v. United Air Lines, Inc., Id. at 384, *see,* Petition, page A-13.

After viewing the facts in the light most favorable to petitioners, the Tenth Circuit Court of Appeals held that Grandchamp and Seewald did not present sufficient evidence to satisfy minimal Colorado standards for jury consideration of an outrageous conduct claim.

II. The preemption question raised by Petitioners is illusory because reversal would not change the ultimate result in this case.

The only overlap between the ADEA claim and the outrageous conduct claim in this case is factual. The foundation of Petitioners' case was the allegation that United created a reorganization scheme to eliminate senior employees. Upon this foundation, Petitioners attempted to build two theories. The first was that the alleged discriminatory scheme was a violation of the ADEA. The second was that the alleged discriminatory scheme constituted outrageous conduct. Under this approach, the same facts were necessary to prove either cause of action. The jury found that there was no discrimination and, hence, no scheme on the part of United to discriminate against Grandchamp and Seewald on the basis of their age. The Tenth Circuit Court of Appeals determined that there was *no evidence* to justify submission of the outrageous conduct issue to the jury.

Petitioners point to Footnote no. 8 of the Tenth Circuit opinion, *Grandchamp v. United Air Lines, Inc., Id.* at 385, *see,* Petition, page A-14 to raise the spectre of preemption and to imply some conflict between state and federal rights in this case. The footnote must be read with an understanding of the factual context and the factual determinations. The theoretical hierarchy of damages described in that note is merely illustrative. The court explains that when separate claims of age discrimination and outrageous conduct arise from the same facts, Colorado law requires something more egregious than bare allegations of discrimination to substantiate the outrageous conduct claim. The Court does not state, or even imply, that Plaintiffs must first prevail on their age discrimination claim to submit an outrageous conduct claim to a jury. The note simply explains that under Colorado law, Plaintiffs must make some showing of outrageousness to submit an outrageous conduct claim to the factfinder. Thus, there is no preemption issue. Even if the issue existed, it would be fruitless to ramand this case to determine whether the outrageous conduct claim could stand independent of the underlying discrimination claim. The Court of Appeals already examined the evidence of outrageous conduct under state law and found it lacking. This evidence would still be inadequate regardless of the outcome *or even the existence* of an ADEA claim.

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

February 23, 1989

Respectfully submitted,

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